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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. [redacted] 41

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

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In the Supreme Court
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OCTOBER TERM, 1929

No. 628

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

I.

SUPPLEMENTAL STATEMENT OF FACTS.

In this petitioner's petition for Writ of Certiorari, petitioner gave a summary and short statement of the facts involved in the case. In addition thereto, petitioner wishes to add that pursuant to the constitutional amendment Section 15, Article XIII, of the Constitution of the State of California, and the enactments of the Political Code of the State of Cali-

fornia in accordance therewith, being Chapter 19, Section 1, Statutes of California, 1927, and also being Sections 3664aa et seq. of the Political Code of the State of California, the said Board of Equalization of said State required petitioner to file with it a statement of his gross receipts from the operation of his stage line during the year 1926. Upon the basis of this statement for the year 1927, the Board assessed against this petitioner the taxes in question, which petitioner paid under protest. The receipts of this petitioner from the operation of his stage line for the year 1926 are as follows:

Gross receipts from carrying passengers	$ 8,893.31
Gross receipts from carrying freight	9,806.43
Gross receipts from carrying U. S. mail and parcel post	42,286.75
Total gross receipts for the year 1926	$60,986.49

Upon the basis of these receipts the State Board of Equalization of the State of California assessed taxes against this petitioner in the total amount of $2,978.78. On the basis of the calculation of this tax of the latter sum, $2,114.32 is based upon the receipts of this petitioner from carrying United States mail and parcel post.

After payment of this tax under protest, this petitioner sued in the Superior Court of the State of California, in and for the County of Sacramento, for a return of that portion of the tax derived from the percentage of receipts from carrying mail and parcel post. After demurrer sustained without leave to amend, judgment was taken in said Superior Court

against this petitioner. This petitioner thereupon appealed to the Supreme Court of the State of California, in which latter Court judgment of the said Superior Court was affirmed. From the judgment of the Supreme Court of the State of California this petitioner thereupon petitioned this Court for a Writ of Certiorari to the Supreme Court of the State of California, which petition was by this Court granted.

II.

ARGUMENT.

A.

METHOD OF TAXATION INVOLVED.

The method of evaluating property for tax purposes upon the basis of gross receipts was first adopted by the State of California with the enactment of Section 14 to Article XIII of the Constitution of the State of California, enacted in November, 1910.

San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244;

Pullman Company v. Richardson, 185 Cal. 484.

Various reports of commissions relating to this method of taxation were cited and discussed beginning on page 19 and ending on page 22 of petitioner's brief in support of his petition for Writ of Certiorari on file herein. This method is also discussed by this Court in *Pullman Company v. Richardson*, 261 U. S. 330.

From these reports and authorities the purpose of the adoption of this method of taxation was to arrive

at an actual valuation of a going concern, like a public utility, that would include therein the intangible value of the system or operating property constituting its good will. In other words, the valuation of the physical properties of a system like a railroad company or a telegraph company would not reach the intangible or good will value of such business.

The gross receipts method of valuation, however, was a yardstick by which these intangible values would be reached, and the percentages adopted in the constitutional amendments or later adopted by the legislature of the State of California would be a basis upon which a fair valuation of such system would be determined.

The petitioner in this case is not objecting to the method of taxation but rather to the manner in which it is applied to this petitioner. This petitioner contends that as this method is being applied to him by the said Board of Equalization, it

(1) *results in a grossly excessive valuation of his operating properties;*

(2) *that as applied, it is arbitrary, confiscatory and constitutes the taking of his property without due process of law;*

(3) *that the constitutional amendment itself by its express terms, applies only to common carriers, and that this petitioner in carrying United States mail is not a common carrier,* and

(4) *that it is a tax upon an agency of the federal government.*

B.

THE METHOD OF TAXATION HEREIN INVOLVED AS APPLIED TO THIS PETITIONER RESULTS IN A GROSSLY EXCESSIVE VALUATION OF HIS OPERATING PROPERTIES.

As indicated by the foregoing discussion and authorities the method of taxation involved in this matter was adopted to arrive at the real value of the property. Section 1 of the Constitution of the State of California provides:

> "All property in the State, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law as hereinafter provided."

In *Pullman Company v. Richardson*, 185 Cal. 484, at page 491 the California Supreme Court says:

> "The question as to whether or not a particular taxing law violates the Federal Constitution depends upon the practical operation and the effect of the tax imposed, and not upon the definitions or declarations of State authorities. The rule is thus stated in the recent case of *Shaffer v. Carter*, 252 U. S. 37 (64 L. Ed. 445, 40 Sup. Ct. Rep. 221): 'For where the question is whether a state taxing law contravenes rights secured by that instrument the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.'" (Citing authorities.)

In *Union Tank Line Company v. Wright*, 249 U. S. 275, at page 282, the Court says:

> "A state may not tax property belonging to a foreign corporation which has never come within

its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. Insofar, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct. For example, the mileage basis in case of a telegraph company (Western Union v. Massachusetts) and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). *But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both.*"

When the method of taxation herein involved was before this Court in the case of *Pullman Co. v. Richardson*, 261 U. S. 330, this Court said at page 339:

"The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all

other taxes on such property. The Supreme Court of the State holds it a tax on the property specified. In no material way does it differ from the tax which was recognized by this Court as a proper tax in U. S. Express Co. v. Minnesota and Cudahy Packing Co. v. Minnesota above cited. True, it is computed with special regard to gross receipts, but this as is fairly shown is done merely as a means of getting at the value of the property considering its nature and use. *The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property value as part of a going concern, nor to be relatively higher than the taxes on other kinds of property.*"

In the present case this petitioner in his complaint alleged that the tax was grossly excessive and placed an unreasonable valuation upon plaintiff's property. In Paragraph V of petitioner's complaint (transcript of record, page 2), this petitioner set forth an itemized list of his property and its actual market value. In Paragraph VII of said complaint (transcript of record, page 3) this petitioner alleged that the State Board of Equalization had made the assessment in an arbitrary and excessive manner and that the valuation thereon calculated upon a gross receipt basis results in the valuation of this petitioner's property far in excess of its actual worth.

Respondent's demurrer admitted all these facts. Consequently, this petitioner's case herein involved is distinguishable from the case of *Pullman Company v. Richardson, supra*, wherein this Court says at page 339.

> "The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern nor to be relatively higher than the taxes on other kinds of property."

This petitioner has contended at every stage of the proceedings that this tax is far in excess of what would be legitimate as an ordinary tax on his property valued as a going concern, and that it is grossly higher than the taxes on other kinds of property; that it in no way attempts to reach the real value of this petitioner's property.

This petitioner in said complaint, Paragraph VII thereof, alleges that under the *ad valorem* method of valuing property for taxes, this petitioner never paid in excess of $350.00 per annum as a tax on said property. Therefore, if this petitioner's property has any value as a going concern, such value is represented only in its ability to earn income from carrying *passengers* and *freight*. On this basis, to-wit, receipts from carrying passengers and freight, and the basis of the assessment made against this petitioner by the State Board of Equalization for 1927, the tax on petitioner's property would be $861.56 after excluding therefrom the tax derived by including the gross income from carrying United States mail. In other words, after the adoption of the gross receipts method of evaluating petitioner's property the amount of tax assessed against this petitioner would be more than double the amount of tax assessed under the *ad valorem* method of valuing property after excluding the receipts from carrying United States mail.

C.

THE TAX AS ASSESSED AGAINST THIS PETITIONER BY THE CALIFORNIA STATE BOARD OF EQUALIZATION WAS ARBITRARILY MADE, IS CONFISCATORY AND CONSTITUTES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Prior to the adoption of the gross receipts method of evaluating property in Section 14 of Article XIII of the Constitution of California, hearings were held by commissions appointed for the purpose of determining the operation of the method of taxation. In *Pullman Company v. Richardson*, 185 Cal. 484, at page 504, the California Supreme Court says:

> "Before the new scheme was recommended hearings were had before this Commission and all transportation companies, including plaintiff, doing business in this State were given an opportunity to present their views and their data upon the subject."

This petitioner in his complaint, Paragraph VII thereof (beginning on page 3, transcript of record), alleges that the State Board of Equalization in fixing the valuation on this petitioner's property considered no other element of value with reference thereto, except its gross earnings. This allegation of fact is admitted by the demurrer. In other words, no hearings were had, no opportunity was given to this petitioner, and other persons similarly situated to present their views and data upon this subject to determine whether or not the tax in its application would result in a fair valuation of the property involved. This petitioner therefore, contends that the method as applied by the State Board of Equalization was arbitrary and re-

sulted in a grossly excessive valuation of this petitioner's property. This petitioner's further views, contentions and authorities are set forth beginning on page 23 of his brief in support of his petition for Writ of Certiorari. Therefore, the making of this arbitrary assessment constitutes a taking of this petitioner's property without due process of law.

D.

SECTION 15 OF ARTICLE XIII OF THE CALIFORNIA CONSTITUTION APPLIES BY ITS EXPRESS TERMS TO COMMON CARRIERS ONLY.

This petitioner contends that since by the language of the section itself it applies only to common carriers, that this petitioner is not subject to the tax so far as carrying United States mail is concerned; that in this capacity he is not a common carrier, and that to classify him as such constitutes a violation of the Fourteenth Amendment of the Federal Constitution.

This petitioner has discussed this point in his brief in support of his petition for Writ of Certiorari, beginning on page 27 thereof.

In addition to the matters set forth in said supporting brief, this petitioner desires to call attention to the case of *Lake Tahoe Railroad Co. v. Roberts*, 168 Cal. 558. In that case it was held by the California Supreme Court that boats operating on Lake Tahoe and owned by Lake Tahoe Railroad Company were not used exclusively in the railline business of that company, and hence were not taxable for state purposes by the gross receipts method under the terms

of Section 14 of Article XIII of the Constitution. The Lake Tahoe Railway Transportation Co., owned and operated a rail line between Truckee, California and Tahoe City, California, and owned and operated boats plying between Tahoe City and various points on Lake Tahoe. The boats carried passengers and freight to and from the trains at the railway depot at Tahoe City, and between points on the lake. Forty-five per cent (45%) of the gross receipts from the operation of the boats was derived from purely lake service. Fifty-five per cent (55%) of the gross receipts from the operation of those boats was derived from rail line business with the boats serving as rail line adjuncts. So distinct were the two operations that in the winter months the rail line business was entirely suspended, but the boats continued to run up and down the lake carrying passengers, mail, freight and express.

In the *Tahoe* case the Court was concerned with the dual use of property, one use being a rail line use, and the Court concluded that under those circumstances the boats being devoted about equally to the two uses, it could not be said that the boats were used exclusively in a rail line business.

The language of Section 15, of Article XIII of the California Constitution, so far as the definition of operative property is concerned, is identical with the language of Section 14 of that article in its definition of operative property. Only that property which is "used exclusively" by an automotive common carrier is subject to the tax provided for in Section 15 of Article XIII. This petitioner in his complaint shows

that 70% of his gross earnings for the year 1926 were derived from the transportation of government mail.

Petitioner, therefore, contends that since he is not a common carrier while carrying United States mail, that to classify him as such by requiring him to report his gross receipts therefrom, and to evaluate his property thereupon, constitutes a taking of his property without due process of law.

E.

THE METHOD OF TAXATION SO INVOLVED WAS ADOPTED IN ORDER THAT THE INTANGIBLE VALUE OF A LINE OR SYSTEM MIGHT BE INCLUDED IN THE VALUATION THEREOF

The intangible value so sought to be included in the valuation of a property is sometimes termed the good will thereof. What is good will? Good will is defined generally in 28 *Corpus Juris* 729 as follows:

> "Good will may be defined to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill, affluence, punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. This comprehensive definition has been cited with approval in numerous cases. An early decision defined it to be nothing more than the probability that the old customers would resort to the old place. But this definition, although

> frequently quoted, has been criticised as too narrow. In its broadest sense good will may be said to be reputation, but generally the definitions given by the courts include as a leading element the probability that the customers of the old establishment will continue their patronage."

In the present case petitioner contends that his property has acquired no good will by reason of his contract for carrying United States mails. This Court may take judicial notice of the fact that mail contracts are awarded by the Post Office Department after competitive bidding; that the successful bidder is required to furnish bonds for faithful performance, and that the contract is personal to him. See *U. S. Code Annotated*, Title 39, Secs. 421 et seq.

People do not send mail and become customers, and continue as such because of any reputation of a particular mail carrier, or because they are accustomed to patronize him. Furthermore, so far as a mail carrier is concerned, he has a monopoly over his line.

In *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, the Court held that a company having a monopoly in its line could not consider good will as part of the value thereof.

To the same effect is *Wilcox v. Consolidated Gas Company*, 212 U. S. 19. At page 52, the Court said:

> "We are also of the opinion that it is not a case for the valuation of 'good will'. The master combined the franchise value with that of good will and estimated the total value at twenty millions. The complainant has a monopoly in fact,

> and the customer must take gas from it or go without. He will resort to the 'old stand' because he cannot get gas anywhere else. The Court below excluded that item and we concur in that action."

Therefore, in the present case, this petitioner has a monopoly on carrying the mails between Redding, California, and Big Bar, California. People send their mails not because they like petitioner but petitioner is the only agent furnished by the Post Office Department of the United States to transport mail between these points.

F.

THE TAX IN QUESTION HEREIN IS A TAX UPON AN AGENCY EMPLOYED BY THE FEDERAL GOVERNMENT IN THE EXERCISE OF ITS CONSTITUTIONAL POWERS.

In petitioner's brief in support of his petition for Writ of Certiorari, we have attempted to show, and believe we have shown, that the property that is being taxed in this case is the property being used by this petitioner in carrying freight, passengers and United States mail, and in addition thereto, the mail contract existing between this petitioner and the United States Government.

The State of California denominates this tax a property tax. If so, it must rest upon all property which contributes to gross receipts. The property which contributed to the gross receipts on which the tax against this petitioner was assessed, was based

upon his physical property and a Federal mail contract, *ergo,* part of the tax must rest upon the mail contract.

The argument and authorities heretofore furnished show that the tax in question is excessive so far as the valuation of the property is concerned. That it was assessed simply by taking the gross receipts of this petitioner for the year 1926. That as a mail carrier this petitioner's business has no good will or intangible value, as any his stage line may have is attributable only to the carrying of freight and passengers. That in carrying mail, this petitioner is not acting as a common carrier and therefore he should be exempted from the tax so far as his carrying mail is concerned, by the express provisions of the act. This being so, the only conclusion that can be reached is that the tax assessed against this petitioner affects the taking of part of his gross receipts from carrying mails by the State of California thereby making the Federal Government contribute to the taxes levied by the State of California.

In going over this ground, we feel that we are covering exactly the same ground that was covered by Mr. Chief Justice Marshall in the case of *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, the principles of which case have been so long recognized and settled, that the citation of further authority than this case itself is simply a work of supererogation. Reverting, however, to the well-established doctrine of this case, this petitioner wishes to call this Court's attention to certain pertinent language contained in the opinion of that case. On page 417, the Court says:

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such Court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment."

In the same opinion on page 427, the Court says:

"That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled

by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

And finally, in this case, at page 431 the Court says:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose

that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

"If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

"If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

In the recent cases of *MacAllen Company v. Massachusetts*, 279 U. S. 620, at page 625 this Court says:

"The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving a tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg, &c. Ry. Co. v. Texas*, 210 U. S. 217, 227. And this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities. If, by varying the form—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught. The rule is otherwise. To this effect, the following cases may be cited as illustrative.

"A tax laid in terms on the occupation of an importer is in effect a tax on imports. *Brown v. Maryland*, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:

"'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode

of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.'

"A tax on the income of an office is a tax on the office itself, and cannot be laid in that form if the office be exempt. *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435.

"A tax on sales made by an auctioneer is a tax on the goods sold, and, where such goods are imported and sold for the importer, the law authorizing the tax is void as imposing a duty on imports. *Cook v. Pennsylvania*, 97 U. S. 566.

"A stamp tax upon a bill of lading is in substance and effect a tax upon the thing transported, because of its necessary association with the shipment. *Almy v. California*, 24 How. 169, 174. And see *Woodruff v. Parham*, 8 Wall. 123, 138."

And further, at page 629, the Court says:

"These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the

former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting to the well-established rule that '* * * what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result * * * constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.' Fairbank v. United States, 181 U. S. 283, 294, 300."

The foregoing authorities indicate clearly that no matter under what guise the tax may be dressed, it cannot be allowed to have the effect of being a taxation upon a means employed by the Federal Government to affect its constitutional powers.

Again we refer to the case of *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, also cited and referred to in petitioner's brief in support of his petition for writ of certiorari. In this case, the State of Mississippi sued to recover the amount of a state tax on gasoline claimed to be due from the distributor of gasoline sold to the United States Government for the use of its Coast Guard fleet in service in the Gulf of Mexico, and its Veterans Hospital at Gulfport. At page 452, the Court says:

"The United States is empowered by the Constitution to maintain and operate the fleet and

hospital. Article 1, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (article 6); and, in case of conflict they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions."

In the last cited case, the Federal Government was buying gasoline. The State of Mississippi sought to collect a tax on the gasoline sold to the Federal Government. The Court recognized that if such a tax were allowed the ultimate payer of the tax would be the United States Government and it therefore held that such tax would not be allowed.

In the case at bar, this petitioner is selling to the United States Government his services in carrying United States mail. From the price which the United States Government is paying this petitioner for his services, the State of California has exacted a portion of these receipts. There can be no difference in the sale of a commodity involved in the case at bar and in the case of *Panhandle Oil Company v. Mississippi, supra*. If the right to tax in one case is denied, it should be in the other. If the tax in the case at bar is allowed, the cost of carrying United States mail will be increased and the increased cost will be paid by the United States Government.

The recent case of *New Jersey Bell Telephone Co. v. State Board of Tax and Assessment of the State of New Jersey*, 280 U. S. 338, seems to be determinative of the question here involved.

In the last cited case, the State of New Jersey sought to tax the appellant telephone company a franchise tax based upon its gross receipts. At page 346, the Court says:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co. v. Richardson*, 261 U. S. 330, 338, 67 L. Ed. 682, 686, 43 Sup. Ct. Rep. 366, and cases cited; *Sprout v. South Bend*, 277 U. S. 165, 171, 72 L. Ed. 833, 837, 62 A. L. R. 45, 48 Sup. Ct. Rep. 502. This tax cannot be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

In the case at bar, if the tax is one upon the gross receipts derived from carrying United States mails, it falls within the inhibitions of the Federal Constitution since the regulation of the mails is vested by this Constitution in the Federal Government exclusively. It is true that in the *New Jersey* case the tax was designated as a franchise tax while in the case at bar the tax is designated as a property tax. However, since the pleadings in this case show that the tax, as assessed, results in an exorbitant tax, when we reach a line where a tax becomes exorbitant, it can no longer be called a property tax but constitutes a direct taking

of the moneys paid by the United States Government for the carrying of mails by the State of California under the guise of a tax.

In the *New Jersey* case, the Court at page 348 continues:

> "Assuming, as appellee contends, that these assessments did not include the value of appellant's right to use streets, it would be without rational basis and arbitrary to use a mileage proportion of gross earnings to measure the value of the privilege or easement in question."

So, in the case at bar, if we assume that in making the assessment involved, the California State Board of Equalization did not include in the property tax the contract for carrying United States mails, the tax is without rational basis and arbitrary in that no effort was made to ascertain the value of petitioner's property other than to take the gross receipts which be derived from all sources in the use of the property in the year 1926.

CONCLUSION

It is therefore respectfully submitted that in the light of the foregoing points and authorities that this case is one in which the decision of the Supreme Court of the State of California should be reversed.

Dated, San Francisco, California,
November 24, 1930.

Respectfully submitted,
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